Rockline Industries, Inc. *and* United Food and Commercial Workers Union, Local 2008. Case 26–CA–20950

February 27, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On November 21, 2003, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Rockline Industries, Inc., Springdale, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. February 27, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT warn, suspend, or discharge any of you because you support and engage in activities on behalf of United Food and Commercial Workers Union, Local 2008 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful warning issued to David Kennan and the unlawful suspension imposed him on August 30, 2002.

WE WILL, within 14 days from the date of the Board's Order, offer David Kennan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

[1] There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by engaging in surveillance of employees' union activities.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by issuing David Kennan a 3-day suspension, we agree that the Respondent's reasons for suspending Kennan were pretextual. However, in finding pretext we rely solely on the evidence discussed by the judge which shows that Kennan was treated disparately. In particular, we rely on evidence that on the day after the warehouse incident in which Kennan was suspended for interrupting employee Bonnie Bunch's work to discuss a nonwork related matter, the Respondent became aware that employee Duane Stevens engaged in the same conduct by interrupting Kennan on worktime to discuss whether Kennan "really knew what he was getting into with this union thing." Stevens, however, was not disciplined.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by disciplining Kennan for leafleting in the parking lot while off duty, Chairman Battista does not rely on the judge's discussion of *Tri-County Medical Center*, 222 NLRB 1089 (1976), inasmuch as the judge found that the Respondent did not have a no access rule for off-duty employees.

[4] We shall substitute the attached notice for that set out in the judge's decision, in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

WE WILL make whole David Kennan for any loss of earnings and other benefits resulting from his unlawful suspension and discharge, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning, suspension, and discharge, and WE WILL within 3 days thereafter, notify David Kennan in writing that this has been done and that the warning, suspension, and discharge will not be used against him in any way.

ROCKLINE INDUSTRIES, INC.

Dean Owens, Esq., for the General Counsel.
John H. Zawadsky, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Fayetteville, Arkansas, on September 15 and 16, 2003, pursuant to a consolidated complaint that issued on November 25, 2002.[1] Pursuant to a private settlement between two individual Charging Parties and the Respondent, I approved their request to withdraw the charges in Cases 26–CA–21210 and 26–CA–21211, and those case numbers are no longer reflected in the caption. Pursuant to the withdrawal of the charges, I severed those cases and dismissed the complaint allegations predicated upon those charges. The remaining complaint paragraphs allege surveillance of employees engaged in union activities in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) and the warning, suspension, and discharge of David Kennan in violation of Section 8(a)(3) of the Act. The Respondent's answer denies any violation of the Act. I find that the warning, suspension, and discharge of employee David Kennan did violate the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Rockline Industries, Inc., the Company, is a Wisconsin corporation, engaged in the manufacture of baby wipes at its facility in Springdale, Arkansas. The Company, in conducting its business, annually purchases and receives at its facility goods and materials valued in excess of $50,000 directly from points located outside the State of Arkansas. The Company admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates are in 2002 unless otherwise indicated. The charge in Case 26–CA–20950 was filed on October 15 and was thereafter amended on January 28, 2003.

The Respondent admits, and I find and conclude, that United Food and Commercial Workers Union, Local 2008 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company's manufacturing facility in Springdale, Arkansas, employs approximately 650 employees and operates with four 12-hour rotating shifts. Operations are overseen by General Manager Nick Santoleri. Personnel matters are handled by Human Resources Director Sam Wilson and Senior Human Resources Administrator Catherine Jones, both whom are admitted to be supervisors.

In May, the Union began an organizational campaign at the Company. The parties stipulated that the Company actively opposed the organizational activity and conducted informational meetings stating its opposition to unionization.

Employees are subject to various rules contained in an employee handbook. Employees who commit infractions are subject to progressive discipline, a verbal warning followed by a written warning, a final written warning that may include a suspension, and discharge.

Employee David Kennan received a verbal warning in the year 2000 for failure to properly perform his job resulting in product being lost. On June 7, he was warned by Facilities Manager Michael Gray for interrupting another employee's work for approximately 10 minutes. The subject of the conversation that led to the warning was the Union. The foregoing warning is not alleged to have violated the Act. Although Human Resources Director Sam Wilson initially testified that he became aware of Kennan's union activity in August, after reviewing his pretrial affidavit Wilson acknowledged that "[i]t very well could be" that he learned of Kennan's union activities when, in June, it was reported that the subject of the conversation that resulted in the warning of June 7 "was related to the Union."

Further confirmation that the Respondent was aware of Kennan's union sympathies prior to August is established by an incident in late June in which employee Bob Fullerton reported that Kennan had approached him in the breakroom and started talking about "union related activities." Kennan explained to Director Wilson that there was no way that he could have known that Fullerton was not on break since he was in the breakroom. Wilson informed him that "from now on, he needed to establish that fact," i.e., that the employee with whom he was speaking was actually on break. Kennan was not disciplined on this occasion.

B. The 8(a)(1) Allegations

The complaint, as amended at the hearing to correct the date, alleges that Human Resources Director Sam Wilson engaged in surveillance of employees engaged in union activities on September 5 at the Jones Center, a public community center in Springdale, Arkansas. The Jones Center complex is 2 blocks wide and about 5 blocks long. It encompasses several buildings as well as a swimming pool and basketball courts.

September 5 was a day off for employee Heriberto Gonzales. He went to the Jones center at about 2 p.m. for a union meeting. On discovering that the meeting was not being held in the room in which those meetings were customarily held, Gonzales went to the information desk which is located in a central lobby from which multiple hallways radiate. While standing in line, two or three additional people joined the line and, thereafter, according to Gonzalez, he observed that Human Resources Director Sam Wilson had also joined the line. He testified that, although he did not speak to Wilson and Wilson did not speak to him, he saw Wilson and that Wilson saw him. The room in which the union meeting was being held was not visible from the information desk.

I question whether testimony placing Director Wilson in the same line as Gonzales at the Jones Center, a large public community center, is sufficient to establish surveillance. The individual Gonzales identified as Wilson was not in a position to observe the room in which the union meeting was to be held. Although purportedly recognizing Wilson, Gonzales did not speak to him which causes me to question the certainty of his identification. The individual, who Gonzales states saw him, did not speak to him or, so far as the record shows, react in any way that would suggest that he considered his presence in line at the Jones Center to be suspicious or improper. Wilson denied going to the Jones Center in September. Although I do not fully credit his testimony, in this instance, I believe him.

Employee Daniel Ruiz testified that he, accompanied by another employee, also went to the Jones Center to attend a union meeting on September 5. Apparently this was a different meeting since Ruiz recalls that the events he related occurred around 6 p.m. Ruiz used an entrance near the meeting room rather than the main entrance to the building. On approaching the door to the room in which the meeting was to be held, he looked in and observed "a guy that works in production check," an office employee. Ruiz testified that, upon observing the office employee and "hearing voices," referring to conversation inside the room, he "was scared and . . . did not want to go in." Other employees were at the door and some told him to go on in, but others told him not to go in. Ruiz and the employee who had accompanied him to the meeting left. Ruiz testified, without stating the "things" to which he was referring, that the reason he was scared to go in "[b]ecause of all the things that happened at Rockline." He repeated that he and the employee who accompanied him were "nervous and scared," as they returned to their respective cars in the Jones Center parking lot. After they separated, Ruiz testified that he observed an individual whom he identified as Sam Wilson "in his car" with a camera in front of his face. Ruiz testified that the vehicle was 60 to 70 feet away and that he did not identify the make of the vehicle. When asked if he recalled the color of the vehicle, Ruiz testified, "It was so fast, I could not tell the color right now." When asked what was so fast, Ruiz responded, "I wanted to get out of there." No other employee testified to observing Wilson in the parking lot with a camera.

I have credited Wilson's denial that he was at the Jones Center. Ruiz was admittedly scared and in a hurry. I find that Ruiz was mistaken in his identification.

I shall recommend that the allegation relating to surveillance be dismissed.

C. The 8(a)(3) Allegations

1. Facts

Employee David Kennan was disciplined on two occasions on August 30. The first warning was for handing out prounion literature on company property. Although the document memorializing this discipline clearly states, "Employee Warning Record," Wilson testified that he did not know "if you could say this was discipline again." The second document, an "Employee Suspension Notice," was for allegedly interfering with the work of a fellow employee.

On the morning of August 30, Kennan had greeted employee Duane Stevens, who responded saying something about "that Union crap." Kennan responded that he could not talk about that "here" but would be glad to talk to him at break. Stevens replied that he would rather talk "in the parking lot." Kennan asked whether Stevens "though that was constructive," and Stevens responded, "I'll tell you what's constructive." Kennan, who had in late June been accused of interrupting the work of employee Fullerton when speaking to him in the breakroom, did not want the situation "to snowball," and immediately informed Administrator Catherine Jones that he wanted to speak to Director Wilson. About 1 p.m. on August 30, Kennan was called to Wilson's office. Jones and Kennan's supervisor, Linda Riley, were present. Wilson informed Kennan that there were "some things" that he wanted to speak with Kennan about, but that he would let Kennan go first. Kennan reported the encounter with Stevens, noting that he felt threatened by Stevens' reference to meeting him in the parking lot. Wilson responded that he would investigate, but that Kennan "should not expect much, because it was my word against his, . . . a 'he said/she said' type of situation." In a statement obtained from Stevens a week after Kennan reported the incident, Stevens acknowledged that, although he intended no threat, "I think he [Kennan] might have misunderstood what I said as a threat."

Wilson then turned to his agenda. Wilson first addressed a report that he had received regarding Kennan handing out literature in the parking lot on his day off. He informed him that, if he came to the plant again on his day off, that he had to get a visitor's badge. He presented him with a document titled "Employee Warning Record," and requested that Kennan sign it.

Kennan credibly testified that on August 27, a day that he was not scheduled to work, he came to the Company's facility at the time of a shift change at 6 p.m. and distributed prounion literature in the parking lot. He stood at the bottom of a short concrete stairway that provides access to an area called the patio that is adjacent to the plant entrance. Kennan was at the foot of the stairway between a no parking zone and a parking space used by vendors servicing the breakroom vending machines. Photographs of the location, which is now set off by protective yellow poles, establish that Kennan was not in any traffic lanes, and there is no evidence that he obstructed employee access to and from the plant in any way.

The typed document prepared by Director Wilson and titled "Employee Waning Record," in pertinent part recites:

> On August 28, 2002, I was told David Kennan was on the Rockline parking lot and patio areas handing out papers .... David was not scheduled to work Tuesday, August 27th. David being on Rockline's parking lot is a security issue. David is being told to not come on Rockline's property unless he is scheduled to work. . . . If David needs to come to HR on non-scheduled workdays David shall sign in . . . and receive a visitor pass . . . . David shall not go to any other areas of the property or plant without . . . permission. David will be terminated if [he] violates this direction."

No employee who observed Kennan on August 27 testified. Although the document refers only to security, Director Wilson testified that the Company's concern was actually safety with regard to traffic in the parking lot, that "I was telling him to not [be out in the] parking lot because he could [get] hit."

Wilson acknowledged that it is not unusual for employee spouses and friends to come eat lunch with an employee with no requirement relating to visitor passes. The parties stipulated that there are no documents reflecting that any employee other than Kennan has been disciplined for being on Rockline property on their day off or for passing out literature in nonwork areas.

Wilson then informed Kennan that he had been informed that Kennan had been "expressing his opinion . . . around the factory, and it interfered with people's work." He presented Kennan with a typed employee suspension notice providing for a 3-day suspension and directed him to sign it. Kennan did so. This notice states, in pertinent part:

> On August 29, 2002, David Kennan stopped a warehouse employee from doing their work by stopping the employee and talking about personal opinions and non-work related issues. . . . David needs to determine his desire to remain a Rockline employee by following the Rockline company policy and quit interfering with other employees who are working.

At the hearing, the other employee was identified as Bonnie Bunch, a forklift driver. Bunch had made no issue of the forgoing encounter. After the encounter, Bunch's supervisor, Ronnie Mooneyham, asked whether she had been distracted from doing her work and stated that if something was not job related she should not be stopped from doing her job. Bunch confirmed that the interruption was not work related, but she did not state that it had stopped her from doing her job. Thereafter, she gave a statement to Administrator Jones. In pertinent part, it states:

> Sometime between 8:40AM and 9:00AM I was driving my [fork]lift down the aisle . . . David Kennan approached me and addressed me. I thought he wanted to tell me something work related so I stopped. David said that "those fliers they are handing out are illegal." I did not want to discuss anything about this subject so I said "I don't know anything about that" and drove off.
>
> . . . .
>
> David approaches me about this sort of thing almost every day.

Bunch testified that she was on her forklift and stopped when Kennan waved at her, that Kennan made a comment indicating that he was upset about fliers that were being handed out, and that she responded that she did not know what he was talking about. Contrary to her contemporaneous written statement, Bunch testified that she then told Kennan that she had to get back to work but that Kennan just kept on talking. She testified that the encounter lasted for from 5 to 10 minutes. On cross-examination she confirmed that her written statement, quoted above, was true and that is what she told Administrator Jones. Jones confirmed that Bunch informed her that Kennan "wanted to talk about something other than a work related issue, and so she said she didn't want to talk about it, and got back on her lift." Jones did not report that Bunch claimed there was any conversation, and Bunch's written statement establishes that there was no conversation because Bunch "didn't want to talk about it." The encounter ended when she drove off. I do not credit Bunch's testimony that she told Kennan that she needed to get back to work or that the encounter lasted for from 5 to 10 minutes. Her contemporaneous reports do not state that she needed to get back to work. The words she reported that were spoken would have taken no more than 15 seconds to speak. Jones initiated no action against Kennan. She gave Bunch's statement to Wilson.

Wilson did not inform Kennan of the specific manner in which he had purportedly interfered with people's work or of the identity of the employee or employees with whose work he had purportedly interfered. He was not asked for his version of any encounter. The suspension notice issued to Kennan does not name the employee involved or the length of the encounter. Kennan testified that, if he had spoken with Bunch regarding the Union, "it would've been in the breakroom." Bunch, when referring in her statement to other occasions upon which Kennan had approached her, did not specify the location, and there is no evidence of any interruption of her work on those occasions. Bunch testified that she told Administrator Jones about those other occasions. She told Jones that Kennan had been "telling me about how many people he needed to sign this . . . white square piece of paper." Although Bunch did not identify the white square as an authorization card, she understood that the white square related to the Union. Jones did not deny receiving that information from Bunch, and she acknowledged that she informed Wilson of her conversation with Bunch when she gave him Bunch's statement.

When asked whether the Company prohibited all nonwork conversations, Wilson testified, "If it interferes with their job duties, yes, if it's stopping them from working, the answer would be yes. But obviously, they work in close proximity to one another, . . . so I'm sure they have discussion as they're working." There is no rule prohibiting employee conversation.

Regarding the incident between Kennan and Duane Stevens, Wilson was not questioned regarding whether he identified Kennan as the complaining employee when he obtained the statement from Stevens; however, he obviously provided sufficient information for Stevens to have understood the incident to which he was referring since Stevens, although acknowledging the Kennan may have "misunderstood," denied making any threat. Wilson initially testified that, as a result of the investigation, no discipline was issued to either Stevens or Kennan. When asked how the incident in which Stevens approached

Kennan differed from the incident in which Kennan had approached Bunch, Wilson testified that "[t]his was a repeated conduct by Mr. Kennan." Upon further questioning, and contrary to his prior testimony that no discipline had been issued, Wilson asserted that Stevens supposedly received a verbal warning, that he was "probably told" not to "be discussing with Mr. Kennan anything on work time." Wilson acknowledged that no record of this appeared in Stevens' personnel file.

The Company introduced discipline issued to employees Steven Baker, Steven Greer, Kirk McHolland, and Steven Gibbs. Baker, who had previously been told not to talk about other employees, was suspended for 1 day on February 13 by Supervisors Ed Pull and Gary Wages after he "had some words" with another employee and thereafter was talking to other employees about his problem with that employee. The suspension also notes that Baker "was yelling." Greer was warned on August 13, 2001, by Supervisors Wages and Michael Connelly after talking for 30 minutes. McHolland was warned on January 21, 2000, by the mail manager for fraternizing with production personnel on a third occasion after being orally warned the previous day and on the morning in question for this same conduct. Gibbs was warned on December 2, 1998, by Supervisors Michael Gray and Mickey Grimmett after having talked with employees three times for 15, 10, and 10 minutes, a total of 35 minutes. All of the foregoing warnings are handwritten and were issued by the offending employees' direct supervisors.

Kennan returned to work on September 6. He carried with him a small pocket tape recorder. Upon reporting to work, employee Frank Hackler asked Kennan to reimburse him for his purchase of a lottery ticket for Kennan. Kennan emptied his pockets when searching for the money, and Hackler observed an object that looked like a small transistor radio.

Thereafter, as Kennan was at his locker preparing to go to work, employee Dale Bowen observed the object. He testified that he knew it was a tape recorder because he owned one that was identical. Bowen testified that Kennan spoke into the recorder to activate it. Bowen did not ask Kennan about the tape recorder, and Kennan made no comment about it at that time. Bowen went to Hackler and advised him to watch what he said to Kennan, explaining that Kennan had a tape recorder. Hackler asked how he knew, and Bowen explained that he had an identical one. Later in the day, Bowen spoke with Kennan, referring to his return from suspension, and Kennan tapped his pocket and stated, "[T]his time I'll have my version of it."

Hackler reported to Supervisor Linda Riley and Continuous Improvement Coordinator Pattie Whisenhunt that Kennan had a tape recorder. Riley and Whisenhunt, both admitted supervisors, were on the patio, the area at which the employee plant entrance is located and next to which Kennan had distributed prounion literature. The patio is also adjacent to the breakroom which is visible through a large plate glass window. Riley and Whisenhunt observed Kennan in the breakroom. Although Kennan was responsible for emptying waste cans in the breakroom, Whisenhunt testified that Kennan appeared to be doing nothing and that he reached "up to his pocket," implying that he was turning on the tape recorder. Whisenhunt testified that she observed Kennan for approximately 15 minutes during which he did not appear to be doing any work. When Kennan left the breakroom, Whisenhunt called employee Richard Bradshaw to her and informed him that Hackler had told her that Kennan had a tape recorder in his pocket. Bradshaw testified that Whisenhunt and Riley told him that Kennan "was recording our conversation [in the breakroom]." As employee Danny Phipps was leaving the breakroom Supervisor Whisenhunt and employee Bradshaw stopped him, and Supervisor Whisenhunt informed him that Kennan had been "trying to tape record us."

Bradshaw and Phipps went to human resources and asked Administrator Jones whether "state law allowed him [Kennan] to record a conversation without everyone knowing they were being recorded" and whether Rockline had a policy in that regard. Jones stated that she would have to find out and let them know. At the morning break, Bradshaw observed Kennan come into the breakroom. "[I]t appeared that he reached into his left shirt pocket and turned something on or off." Bradshaw and Phipps went to Sam Wilson "to find out if he could tape our conversation without us knowing it."

Kennan's supervisor, Linda Riley, was present with Supervisor Whisenhunt during a portion of the 15-minute period that Whisenhunt observed Kennan in the breakroom. Despite this, neither Supervisors Riley nor Whisenhunt approached Kennan to ask what he was doing. Neither Riley nor Whisenhunt reported to Human Resources Director Wilson that they had been informed that Kennan had a tape recorder.

About 3 p.m., Kennan was called to Wilson's office. Wilson asked him if he had a tape recorder and Kennan acknowledged that he did. Wilson stated that employees had reported to him that employee were afraid that he was trying to tape their conversations. Kennan denied doing so, stating that he had "hardly talked to anybody that day." The foregoing reply was consistent with the reports that Wilson had received that Kennan was only seen in the breakroom. He was not reported as having talked with anyone. Wilson informed Kennan that "he had a tape recorder and he was being disruptive" and that his employment was terminated. Wilson, after admitting that he did not recall specifically what he said, testified that an additional reason for the termination was that Kennan had kept employees "from doing their job, . . . and he'd done it twice on that day." When called as a company witness, Wilson cited a further reason for the termination, that "he [Kennan] was not doing his job."

Kennan's termination notice states: "TAPE RECORDER IN PLANT-CAUSING EMPLOYEE PROBLEMS." Interfering with the work of other employees or not doing his job is not mentioned. In its submission to the Arkansas employment security department, when Kennan sought unemployment compensation, the Company reported: "David [Kennan] brought a tape recorder to the plant-causing employee problems."

The Respondent argues that Kennan's actions "caused an uproar." There is no evidence of an "uproar." Employee Hackler had reported to Supervisors Riley and Whisenhunt that Kennan had a tape recorder. After observing Kennan's purportedly suspicious actions in the breakroom they neither confronted him nor reported the matter to Director Wilson. The only action they took was to state their suspicions to rank and file employees Bradshaw and Phipps.

The Company had no policy relating to possession of tape recorders on company property. On October 6, 2001, employee Edward Reygadas brought a tape recorder to the plant. Employee Debbie Janagan reported this to Supervisor Chris Spence. Spence confronted Reygadas who acknowledged that he did have a recorder, which he had forgotten to take it out of his pocket before reporting to work. He denied taping any conversations. Thereafter, Spence heard from another employee that Reygadas had stated to that employee that he had brought the recorder in order to record statements made on the radio between maintenance and warehouse employees. No disciplinary was taken again employee Reygadas for this incident.

The Company stated on Kennan's termination notice and in response to his unemployment application that Kennan was terminated for bringing a tape recorder to the plant and causing employee problems. On February 24, 2003, when responding to the charge herein, the Company's position refers to an affidavit given by Director Wilson in which Wilson states that the termination was not based upon Kennan "having a tape recorder on company premises, as such, *but was based* on the fact that he was wasting time again."[2]

Following Kennan's termination on September 6, the Company, on September 11, obtained separate statements from Hackler, Bowen, Bradshaw, and a joint statement from Supervisors Riley and Whisenhunt.

2. Credibility

The Respondent, noting that Kennan admitted having memory problems regarding following detailed procedures and that, when applying for a job following his termination, he did not assert that he was discharged for union activity, argues that he cannot be credited. I attach no significance to Kennan's failure to assert the legal conclusion that he was terminated for union activity when seeking interim employment. His testimony was forthright and credible. Wilson did not dispute Kennan's recollection of what occurred at their meetings.

The General Counsel argues that Director Wilson was not credible and cites, among other instances, his refreshed recollection regarding when he leaned of employee union activity and his admitted inability to recall exactly what he said when terminating Kennan.

Few of my findings are dependent upon testimonial contradictions. I have credited Wilson's testimony that he was not at the Jones Center in September. I have not credited Bunch's testimony that is inconsistent with her contemporaneous statement. My chief credibility determinations relate to my rejection of the Company's asserted justifications for its treatment of Kennan, as testified to by Wilson, in view of the undisputed evidence that it promulgated a rule that affected only Kennan, that it treated him disparately, and that it asserted reasons other than the reasons initially stated in its own documents in an attempt to justify it actions.

3. Analysis and concluding findings

The complaint alleges that Kennan was issued a discriminatory warning on "about August 29." The record established that he was actually warned on August 30. Although Wilson was unwilling to characterize the employee warning record as discipline, the memorialization of the directive that Kennan not "shall not go to any other areas of the property or plant without . . . permission" and that violation of that directive would result in termination confirms that the document did constitute discipline. The document reports that Kennan was "handing out papers," without mentioning that he was distributing prounion literature. It cites "security," and imposes upon Kennan the requirement that he "sign in . . . and receive a visitor pass." Wilson, in his testimony, did not mention security but referred to safety.

The Respondent, in its brief, argues that Kennan never explained to Wilson that he was standing to the side of the patio area. That argument begs the question. Wilson did not ask for any explanation. He told Kennan that he had learned that he had been "handing out literature in the parking lot on his day off," and that "if he came to the plant again on his day off, that he had to get a visitor's badge." The employee warning record does not address where Kennan was standing but states that his "being on Rockline's parking lot is a security issue." Thus, contrary to the Respondent's argument, its own document establishes that the issue was not where Kennan was standing but was that he was present. He was present handing out prounion literature. Wilson did not address how safety rather than security related to the requirement that Kennan obtain a visitor pass or obtain permission to enter the property. He acknowledged that it is not unusual for employee spouses and friends to come eat lunch with an employee with no requirement relating to visitor passes. The Respondent stipulated that Kennan is the only employee upon whom the Respondent has ever imposed the requirement of obtaining a visitor pass. Additionally, the Warning Record prohibited Keenan from going to any area of the Respondent's property "without . . . permission."

The Respondent, prior to August 30, did not have a no-access rule. No such rule is cited in the warning. Thus, the warning promulgated a no-access rule applicable only to Kennan. The applicable test for valid no-access rules is set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976), which explains that a no-access rule concerning off-duty employees is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity, and that, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. The Respondent established no credible business justification relating to security, the only reason cited in the warning, regarding denying Kennan access to the nonworking parking lot area. Nor did the Respondent present any probative evidence establishing that there was any issue regarding safety, the justification cited by Wilson in his testimony. The restriction imposed upon Kennan did not apply only to working areas, and it was not promulgated to all employees.

Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), holds

[2] The position statement was received as an exhibit. The affidavit is not attached.

that, to set forth a violation under Section 8(a)(3), the General Counsel is required to show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer's conduct. Once this showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. To sustain his initial burden, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action.

The record establishes Kennan's union activity and the Respondent's knowledge of that activity. An inference of discriminatory motivation may be established without direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). "Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. . . . [E]vidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences." *Sartorius, Inc.*, 323 NLRB 1275, 1280 (1997), citing *Adco Electric, Inc.*, 307 NLRB 1113, 1128 (1992); *Fluor Daniel, Inc.*, 311 NLRB 498 (1993), and *Association Hospital Del Maestro*, 291 NLRB 198, 204 (1988). There is no probative evidence that security, the reason stated in the warning, or safety, the reason cited by Wilson in his testimony, constituted justification either for the warning or for the requirement that Kennan alone obtain permission before coming onto the Respondent's property. I find both asserted justifications to be false.

I find that the Respondent's warning of Kennan resulted from his distribution of prounion literature. The statement in the warning that his presence was a security issue is belied by the absence of any rule prohibiting off duty employees from entering the premises and the acknowledged fact that it is not unusual for nonemployees to join spouses or friends for meals. It is further undermined by Wilson's testimony that Kennan's presence was a safety issue, a fact not cited in the warning or established by probative evidence. The Respondent, by warning Kennan for distributing prounion literature, violated Section 8(a)(3) of the Act.

Kennan was suspended for 3 days on August 30 following the Respondent's receipt of a report on August 29 that he had interfered with the work of another employee.

The statement provided by employee Bonnie Bunch to Administrator Jones mentions nothing about this brief interruption keeping her from performing her work. Contrary to Bunch's incredible testimony that there was a conversation that lasted for from 5 to 10 minutes, the information in the Respondent's possession and upon which it acted was the information in Bunch's contemporaneous statement to Administrator Jones and her written statement, both of which report an encounter of 15 seconds at most. There was no conversation. As reported in her written statement, Kennan stated that "those fliers they [the Company] are handing out are illegal." Bunch, who "did not want to discuss anything about this subject," replied, "I don't know anything about that" and "drove off."

Kennan, who had previously been warned on June 7, was aware that he could not solicit on behalf of the Union on working time. Although acknowledging that he spoke with Bunch on various occasions, Kennan credibly testified that his comments to her relating to the Union were limited to break and lunchtime. The Respondent acted upon Bunch's statement with no investigation. Kennan was not asked for his version of the encounter. Wilson had already prepared the document suspending Kennan when he called him to the office. "The failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain" are clear indicia of discriminatory intent. *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987).

The Respondent purportedly suspended Kennan for "stopping the employee and talking about personal opinions and non-work related issues." Wilson acknowledged that employees were permitted to speak with each other when working. If Bunch's work duties had required immediate attention, she would not have stopped the forklift. Kennan, a fellow employee, had no authority to ask her to stop. Attention to her work did not contribute to the absence of any conversation. She drove off because she "did not want to discuss anything about this subject." Bunch's statement established a single comment to which she did not want to respond. There is no probative evidence that her work was affected. She made no such claim, and she initiated no report. She reported the brief encounter only after being questioned by her supervisor.

The foregoing evidence is persuasive that, after having passed out prounion literature on August 27, Kennan's activities were carefully observed. Wilson's revised testimony that Stevens was "probably told" not to "be discussing with Mr. Kennan anything on work time," confirms that he was not involved in whatever occurred between Stevens and his direct supervisor. The absence of involvement by the human resources director when such matters do not involve union activity is confirmed by the warning of June 7 issued to Kennan by Manager Michael Gray and the warnings introduced into evidence by the Respondent, all of which are handwritten and signed by the offending employee's immediate supervisor. They are not typed and signed by the human recourses director. The involvement of the director of human resources in all of the discipline issued to Kennan after August 27 confirms that the Respondent was concerned with his activity of passing out union literature and seeking employee signatures on "white squares of paper," as Bunch had reported to Jones.

An employer may not restrict union-related conversation while permitting conversation relating to other topics. *Opryland Hotel*, 323 NLRB 723, 728–729 (1997). The Respondent demonstrated specific animus towards Kennan's union activity of passing out prounion literature by promulgating a no-access rule that applied only to him. His suspension, purportedly for interfering with the work of an employee was pretextual. When the reason given for a disciplinary action is either false or does not exist, the Respondent has not rebutted General Counsel's prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Bunch's statement provided no basis for concluding that she was stopped from doing her work. It reveals a 15-second encounter that ended because Bunch did not want to have a conversation. Even if I were to have found that the Respondent did not seize upon that short interruption in order to

discipline Kennan, Kennan was treated disparately. Prior to organizational activity, employees received warnings only after speaking about coworkers and yelling, conversing for 30 minutes, fraternizing with production employees on a third occasion on two consecutive days after having been warned orally twice, and speaking with other employees on three occasions for a total of 35 minutes. The Respondent, by suspending employee Kennan because of his union activities, violated Section 8(a)(3) of the Act.

Kennan was, according to the Respondent's termination document, discharged for bringing a tape recorder into the plant and "causing employee problems." In testimony, Wilson added a third and fourth reason, that he had kept employees "from doing their job and that that Kennan "was not doing his job." Neither the termination notice nor the communication to the Arkansas employment security department cite such interference with other employees or the neglect of Kennan's job duties. Wilson's testimonial assertions of reasons other than the contemporaneously cited reasons of bringing of a tape recorder onto the property and "causing employee problems" confirm that he was aware that the cited reasons for Kennan's termination would not withstand scrutiny. The only problems were problems caused by the Respondent's supervisors' reports to employees. Bowen speculated that Kennan was activating the recorder by speaking into it, but the only individual to whom he spoke was Hackler. Hackler reported Kennan's possession of the tape recorder to supervisors Riley and Whisenhunt. Rather than confronting Kennan who, according to Whisenhunt had been wasting time in the breakroom, they privately called employee Bradshaw aside and informed him that Kennan "was recording our conversation [in the breakroom.]" Shortly thereafter, Whisenhunt, in Bradshaw's presence, told employee Phipps that Kennan had been "trying to tape record us." Employees Bradshaw and Phipps, rather than beginning work, went to human resources and spoke with Administrator Jones. Neither Riley, Kennan's immediate supervisor, Supervisor Whisenhunt, nor any other supervisor spoke to Kennan. Neither Riley nor Whisenhunt reported the situation to Administrator Jones or Director Wilson. After the morning break, rather than returning to work, Bradshaw and Phipps spoke with Wilson. Wilson did not contact Kennan. There is no evidence that Kennan interrupted the work of any employee. There is no evidence that any assigned job task for which Kennan was responsible was not performed. No further report was made to either Jones or Wilson. Sometime after 3 p.m., Wilson informed Kennan that he was terminated because "he had a tape recorder and he was being disruptive." Nothing was said to Kennan about wasting time.

Some 11 months prior to this incident, when employee Edward Reygadas brought a tape recorder to work, he was directed not to use it on the plant floor. He was not disciplined. No rule regarding possession of tape recorders was promulgated.

After organizational activity began, union adherent David Kennan brought a tape recorder to work. He was terminated and the termination documents reflect that he was terminated for the act of bringing the tape recorder to work and "causing employee problems." There was no rule against bringing a tape recorder to work. Thus, the first reason cited for the termination did not constitute violation of an existing rule. The "problems" established by the evidence consisted of questions posed to Jones and Wilson by Bradshaw and Phipps regarding whether Kennan could record their private conversations. There is no evidence that Kennan had done so, and their speculation that he was doing so resulted from comments made to them by supervisors Riley and Whisenhunt. Supervisor Riley and Whisenhunt, rather than speaking to Kennan or reporting the information they had received from employee Hackler to Director Wilson, fed grist into the rumor mill by informing Bradshaw that Kennan "was recording our conversation [in the breakroom]" and by Whisenhunt telling Phipps that Kennan had been "trying to tape record us." In fact, there is no probative evidence that either statement was true. Kennan credibly denied taping any conversations of his fellow employees. He admitted taping his conversation with Wilson when he was terminated. The employee "problems" were the product of the Respondent's own supervisors' communications to employees of their uninvestigated and unconfirmed suspicion regarding Kennan. Kennan was not responsible.

The General Counsel has established that Kennan engaged in union activity and that the Respondent was aware of that union activity. The Respondent's discipline of Kennan for distributing union literature in a nonworking area during nonworking time that included the unprecedented requirement that Kennan "shall not go to any other areas of the property or plant without . . . permission" establishes specific animus towards union activity and Kennan. His suspension upon the pretext of interfering with another employee's work confirms that animus. His termination pursuant to a nonexistent rule was an adverse action. The General Counsel has established that Kennan's union activity was a substantial and motivating factor in the Respondent's decision to terminate him.

The Respondent has not established that Kennan would have been terminated in the absence of his union activity. The Respondent had no rule regarding the possession of tape recorders. No discipline was issued when employee Reygadas brought a tape recorder to the plant. The "employee problems" cited in the termination document were caused by the Respondent's own supervisors. There is no evidence that Kennan, on September 6, interrupted the work of any employee or failed to complete his assigned job tasks. Even if he had done so, the Respondent did not assert, or rely upon, that conduct when terminating him for bringing a tape recorder to the plant and "causing employee problems." I find that the Respondent terminated Kennan because of his union activity in violation of Section 8(a)(3) of the Act.

CONCLUSION OF LAW

By warning, suspending, and discharging David Kennan because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully disciplined David Kennan on August 30, 2002, for distributing prounion literature in a nonworking area, it must rescind that discipline.

The Respondent, having unlawfully suspended David Kennan on August 30, 2002, it must rescind that discipline and make him whole for any loss of earnings and other benefits plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily discharged David Kennan on September 6, 2002, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, supra.

The Respondent will also be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Rockline Industries, Inc., Springdale, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning, suspending, and discharging employee because of their support for, or activities on behalf of, United Food and Commercial Workers Union, Local 2008, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the unlawful warning issued to David Kennan and the unlawful suspension imposed him on August 30, 2002.

(b) Within 14 days from the date of this Order, offer David Kennan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make David Kennan whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning, suspension, and discharge and within 3 days thereafter notify David Kennan in writing that this has been done and that the warning, suspension, and discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Springdale, Arkansas, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 21, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT warn, suspend, or discharge any of you because you support and engage in activities on behalf of United

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Food and Commercial Workers Union, Local 2008 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful warning issued to David Kennan and the unlawful suspension imposed him on August 30, 2002.

WE WILL, within 14 days from the date of the Board's Order, offer David Kennan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole David Kennan for any loss of earnings and other benefits that he suffered as a result of his unlawful suspension and discharge as set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning, suspension, and discharge and within 3 days thereafter notify David Kennan in writing that this has been done and that the warning, suspension, and discharge will not be used against him in any way.

ROCKLINE INDUSTRIES, INC.